No. 20208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA AIRMOTIVE CORPORATION,

Appellant,

vs.

IRVING I. BASS, Trustee of the Estate of STANDARD AIRWAYS, INC., Bankrupt,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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Jurisdictional Statement.

The Jurisdictional Statement as set forth in the Brief for Appellant is adopted and accepted by Appellee.

Statement of the Case.

Appellee agrees with the Statement of the Case as set forth in the Brief for Appellant and adopts same subject to the comments and corrections hereinafter set forth.

Appellant's Statement of the Case citing Trustee's Exhibit 1, page 19 attributes to the Bankrupt the as-

sertion that it could not continue in business if the aircraft were repossessed (Brief for Appellants, p. 2). The assertion referred to at the cited page is, in fact, an opinion of the Appellant and not a statement of the Bankrupt.

Appellant's Statement of the Case creates an inference that the valuation placed on the aircraft was greatly in error by use of the word "arbitrary" (Brief for Appellant, p. 2). The testimony at its strongest merely indicates that the benefit of the doubt was given the Bankrupt although Appellant felt the aircraft were not worth the figure agreed on [Tr. Vol. 1, p. 11].

ARGUMENT.

I.

The Transfer of Two Aircraft From Standard Airways to California Airmotive Corporation Was Preferential and Voidable Pursuant to the Bankruptcy Act.

The issue here involved is whether or not a present consideration was given in return for the transfer by the Bankrupt to Appellant of its equity in two aircraft.

The entire net equity of the two aircraft, the sum of $24,565.14, was applied by Appellant to the open account in the name of the Bankrupt [Trustee's Ex. 1, p. 17; Trustee's Ex. 1, pp. 29-30]. In so doing, the Bankrupt's account, an antecedent debt, was reduced by $24,565.14 [Trustee's Ex. 1, p. 22]. No book entry was made to indicate that this transfer was in consideration for forebearance of Appellant's right to repossess the aircraft nor was any part of the net equity applied to or charged against such consideration. Additionally, no part of said net equity was appropriated for or applied against a "pre-paid" account for present or future use of the aircraft [Trustee's Ex. 1, p. 35]. Consequently, the total amount of net equity, as indicated by the record, was applied by a credit memo to the antecedent obligation represented by the open account of the Bankrupt [Trustee's Ex. 1, p. 17].

Although a transfer is made by a Bankrupt in order to secure subsequent advances as well as antecedent debts, the transfer is not deprived of its preferential

character to the extent of the security which is applied to the pre-existing debts, 3 *Collier on Bankruptcy,* 855, 14th Ed.

It would, therefore, appear that even if the consideration alleged by Appellant was present (which is not conceded by Appellee) Appellant would still not be able to argue successfully that the transfer was not preferential due to the fact that no part of the net equity was applied to this alleged other consideration and the total amount of the equity was, in fact, applied to the antecedent debt of the Bankrupt.

II.

That the Referee Did Not Abuse His Discretion When He Denied Appellant's Motion to Reopen the Hearing to Offer Evidence of the Value of the Aircraft Which Were Transferred.

The entire record [Tr. 1, Vol. 1] clearly indicates that Appellant was given the opportunity to present any and all proper evidence it so desired on the date of hearing of this matter. No restriction as to the scope of the hearing was placed upon Appellant nor did Appellant make any request for a further hearing or continuance upon the question of valuation. The sole basis for Appellant's motion was that it had failed to put on its evidence with regard to value on the date of hearing [R. 25]. There is no showing of excusable neglect, surprise, newly discovered evidence, or extraordinary circumstances. Certainly, all that Appellant was requesting was a "second day in court" due to the fact that it had been unsuccessful on its "first day in court." To sustain Appellant's position would be tantamount to saying that a trial is never over because, even after the Judge

has ruled, further evidence can be given so long as the written order has not yet been entered. Such a determination would remove from the Judge any power of discretion and would allow a party to withhold evidence until a ruling has been made and then, if necessary, move to allow evidence with regard to those areas in which such party failed to carry its burden of proof. This certainly cannot be the intention of the Legislature or the Judiciary.

Appellant argues that Rule 60 of the Federal Rules of Civil Procedure applies only after an Order or Judgment has been entered but does not cite any authority for the allowance of a motion to reopen prior to entry of judgment. The Federal Rules of Civil Procedure provide for the reopening of a case to take further testimony under Rules 59 and 60. Both of these Rules relate to motions which are made after entry of judgment. If Appellant is correct, that those Rules do not apply to our situation since a written Order has not been entered, it would appear that there is no authority to support the motion made by Appellant and, for that reason alone, same should have been denied.

Even if Appellant's motion was properly made and thereby properly before the Court, the record clearly indicates that there was no abuse of discretion by the Referee in denying said motion [Tr. Vol. 2]. Discretion to reopen a case for the purpose of taking further testimony should be exercised only where circumstances show justification and the failure of a party to call an available witness to meet issues raised at the trial does not justify the reopening of a case after there has been a decision on the merits. *Eastern Airlines v. United States,* 110 F. Supp. 499.

III.

The Findings of Fact of the Referee Are Not Clearly Erroneous and Should Not Be Set Aside.

Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses, *Federal Rules of Civil Procedure,* Rule 52(a).

The mere fact that another court might give facts a different construction or resolve ambiguities differently than the trial court does not make the findings of fact clearly erroneous. *United States v. National Association of Real Estate Bds.,* 339 U.S. 485 (90 S. Ct. 711). This rule is true even if the evidence would support either conclusion. *United States v. Yellow Cab Co.,* 338 U.S. 338 (70 S. Ct. 177).

A finding of fact is clearly erroneous when, despite evidence to support the finding, the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *Alaska Freight Lines v. Harry,* 220 F. 2d 272.

The record, more than substantially, supports the findings made by the Referee.

The record reflects the existence of an open account and the granting of credits upon said account in an amount equal to the full equity of the Bankrupt in the aircraft transferred to Appellant [Trustee's Ex. 1, pp. 17, 22, 23, 29]. There is a total absence of any ref-

erence to an account on Appellant's books representing "pre-paid income" or "other income" having received the benefit of this transfer. Certainly, if the antecedent debt was not to be paid by this transfer, the credit would have gone somewhere other than the open account which represented a past due unsecured obligation.

There can be no question that the findings of the Referee are substantially supported by the evidence.

Conclusion.

For the reasons stated above, it is respectfully submitted that the Order of the District Court affirming the Referee's Order be affirmed.

FLAXMAN, COLEMAN, GORMAN & ROSOFF,
By HOWARD L. ROSOFF,
Attorneys for Appellee.

September 10th, 1965.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD L. ROSOFF

APPENDIX A.

Table of Exhibits.

Exhibit	Record page	Transcript page
Respondent's Exhibit A	71	Vol. I, p. 17
Trustee's No. 1 (21a examination)		Vol. I, p. 8